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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 39.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L., APPELLANT

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR APPELLANT

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INDEX

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
The Statute Involved	2
Statement	2
Specification of Errors to be Urged	6
Summary of argument	6
Argument:	
I. The Supreme Court of the United States has jurisdiction to review upon this appeal the final judgment of the Supreme Court of Wisconsin	9
II. The National Labor Relations Board has exclusive jurisdiction over questions of representation affecting commerce	12
III. The question of representation over which the State Board in this proceeding sought to assert jurisdiction affects commerce and is, therefore, within the exclusive jurisdiction of the National Board	19
A. The La Crosse Telephone Corporation is an instrumentality of interstate commerce	19
B. The jurisdiction of the National Labor Relations Board over questions of representation of the employees of La Crosse Telephone Corporation is exclusive	22
Conclusion	26
Appendix A: Pertinent Provisions of the Wisconsin Employment Peace Act	27
Appendix B: Pertinent Provisions of the National Labor Relations Act and the Labor Management Relations Act of 1947	31
(1) Pertinent Provisions of the National Labor Relations Act	31
(2) Pertinent Provisions of the Labor Management Relations Act of 1947	33

CITATIONS

Cases: Page

Allegheny Ludlum Steel Corp. v. *William J. Kelley et al.*, 330 U. S. 767 ..... 4, 6, 7, 9, 10, 11, 12
American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401 11
Associated Press v. *National Labor Relations Board*, 301 U. S. 103, 128 22
Bethlehem Steel Co. et al. v. *New York State Labor Relations Board*, 330 U. S. 767 ..... 4, 5, 6, 7, 9, 12, 13, 14, 15, 18, 22, 23, 24, 26
Brandeis and Sons v. *National Labor Relations Board*, 142 F. (2d) 977, cert. den., 323 U. S. 751 22
Columbia Broadcasting System v. *U. S.*, 316 U. S. 407, 418, 425 ... 12
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197 22
Creamery Package Manufacturing Co., Matter of, 34 N. L. R. B. 108, W. E. R. B. Decision Case No. 348 E-117 23
Crown Can Company, Decision of W. E. R. B., Case I, No. 2195 E-769, Decision No. 1738-A; 22 L. R. R. M. 1369, 1370 19
Department of Banking v. *Pink*, 317 U. S. 264, 267 11
Eau Claire Press Co., Case II, No. 1797 E-659, Decision No. 1456; 21 L. R. R. M. 1085 19
Elyria Telephone Company of Elyria, Ohio, 58 N. L. R. B. 402 22
Erie Railroad Company v. *Tompkins*, 304 U. S. 64 18
Food, Tobacco Union v. *Smiley*, 164 F. (2d) 891 18
Hill v. *Florida*, 325 U. S. 538, 543-544 20
Jones and Laughlin Steel Corp., Matter of, 66 N. L. R. B. 386.... 26
Kearney and Tucker Corp., Case No. 1994 E-725, Decision No. 1636 25
Linde Air Products Co. v. *Johnson*, 77 F. Supp. 656 18
National Labor Relations Board v. *Boswell Co. and Corcoran Telephone Exchange*, 136 F. (2d) 585 21
National Labor Relations Board v. *Central Missouri Telephone Company*, 115 F. (2d) 563 20
National Labor Relations Board v. *Fainblatt*, 306 U. S. 601 22
National Labor Relations Board v. *Industrial Commission of Utah*, 15 *Labor Cases*, Par. 64, 626 19
National Labor Relations Board v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1 12
Newark Telephone Co. of Newark, Ohio, 59 N. L. R. B. 1408 22
Ohio Telephone Service Company, 72 N. L. R. B. 488 22
Packard Motor Car Co. v. *National Labor Relations Board*, 61 N.L. R. B. 4, 1212 ..... 13, 26
Packard Motor Car Co. v. *National Labor Relations Board*, 330 U. S. 485 ..... 14, 15, 26
Pensacola Telegraph Co. v. *Western Union Telegraph Co.*, 96 U. S. 1 22
Peyroux v. *Howard et al.*, 7 Pet. 324 3
Pittsburgh Rys. Co. Substation Operators and Maintenance Employees' Case, 357 Pa. 379, 54 A. (2d) 891 ..... 18.

Cases—Continued

	Page
Santa Cruz Fruit Packing Co. v. *National Labor Relations Board*, 303 U. S. 453, 467	22
Shell Lake Boat Co., W. E. R. B. Case No. 1794 E-658 R. 792, Decision No. 1437	25
Shell Lake Boat Co. v. *W. E. R. B.*, 22 L. R. R. M. 2360	25
Soss Manufacturing Co., Matter of, 56 N. L. R. B. 348	26

Statutes Cited:

Constitution of the United States:	
Article I, Section 8	4, 6
Article VI	4
Article VI, Clause 2	6
Labor Management Relations Act, 1947 (Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session, 29 U. S. C. Supp., 151 *et seq.*)	15, 16, 17
Section 10(a)	7, 16, 17
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*)	9, 16, 25
Section 2(6)	20
Section 2(7)	20
Section 9(c)	20
Wisconsin Employment Peace Act (Wisconsin Statutes (1945 Ed.), Chapter 111, Sub-Chapter I)	2, 6, 9, 25
Section 111.02 (3)	25, 26
Section 111.02 (6)	26
Section 111.05 (3)	4, 10
Section 111.07 (8)	4, 10

Miscellaneous:

Agreement of August 27, 1948 between W. E. R. B. and N. L. R. B. as to administration of union security provisions of State and National Acts, 22 L. R. R. M. 268	17, 18, 25
Census, 1940	2, 21
Legislative History of the Labor Management Relations Act of 1947, pp. 556 and 331	17
Report of the Joint Committee on Labor Management Relations pursuant to section 401 of the Labor Management Relations Act, Report No. 986, 80th Congress, 2nd Session, pp. 30-31	17
Rand-McNally Standard Map of Wisconsin	3

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Circuit Court of La Crosse County, Wisconsin, has been reported in 12 C.C.H. Labor Cases, Par. 63,795 (1947). The decision of the Supreme Court of Wisconsin (R. 48) reversing the decision of the Circuit Court has been reported in 251 Wis. 583, 30 N.W. (2d) 541 (1947).

JURISDICTION

The final judgment of the Supreme Court of Wisconsin, review of which is here sought, was entered December 24, 1947 (R. 58-59). The petition for appeal was presented and the appeal was allowed on February 25, 1948 (R. 63-66).

The statutory provisions sustaining the jurisdiction of this appeal by the Supreme Court of the United States are contained in Section 237(a) of the United States Judicial Code, as amended by the Act of January 31, 1928 (Act of Feb. 13, 1925, Ch. 229 Sec. 1, 43 Stat. 937; Act of January 31, 1928, Ch. 14 Sec. 1, 45 Stat. 54).

QUESTIONS PRESENTED

1) Does the Supreme Court of the United States have jurisdiction over this appeal.

2) Does the National Labor Relations Board have power over questions of representation of employees of La Crosse Telephone Corporation and, if the National Board has such power, is it exclusive.

THE STATUTE INVOLVED

The Statute of the State of Wisconsin, the validity of which is involved is the Wisconsin Employment Peace Act (Wisconsin Statutes (1945 ed.) Chapter 111, Sub-chapter I, Secs. 111.01 to 111.19, pp. 1795 to 1806). The pertinent provisions of this statute are set forth in Appendix A hereto. The pertinent provisions of the National Labor Relations Act, as amended, are set forth in Appendix B hereto.

STATEMENT

This case arose as the result of the Petition filed on October 8, 1946, by the Telephone Guild of Wisconsin for an election among the employees of La Crosse Telephone Corporation of La Crosse, Wisconsin, to determinne the bargaining representative for such employees (R. 19).

The La Crosse Telephone Corporation is a Wisconsin corporation operating a telephone service in La Crosse Country and handling local and long distance calls in connection therewith (R. 2, 49). The Corporation is located in the city of La Crosse (population 42,707)[1] and renders service to approximately 15,000 subscribers in La Crosse

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[1] *1940 Census.*

County (R. 35). The city is on the Mississippi River, which at that point is the boundary between the states of Wisconsin and Minnesota. The county of La Crosse is adjacent to the state of Minnesota.[2] La Crosse Telephone Corporation is a subsidiary of Central Telephone Company which is the parent corporation of other telephone companies operating in Illinois, Virginia and other states (R. 23). The Park Ridge District in Illinois is operated from the La Crosse office (R. 24).

A hearing was held on the petition of the Telephone Guild at La Crosse by the Wisconsin Employment Relations Board on October 18, 1946. The Corporation and International Brotherhood of Electrical Workers, Local B-953 A. F. of L. objected to the Requested Direction of Election on a number of grounds, including the contention that the Corporation and International Brotherhood of Electrical Workers, Local B-953 A. F. of L. were parties to a binding collective bargaining agreement which served as a bar to the petition (R. 18-38). On November 27, 1946, the Wisconsin Employment Relations Board entered and filed a Direction of Election (R. 15-18) and pursuant to such Direction the Board conducted an election for bargaining representatives on December 17, 1946, following which the Wisconsin Employment Relations Board on January 14, 1947, certified the Guild as the exclusive collective bargaining representative for all employees in the Traffic and Plant Departments, excluding executive and supervisory employees (R. 12-15).

Prior to the filing of the petition for certification of representatives with the State Labor Relations Board, the Guild filed a petition for certification as a bargaining representative with the National Labor Relations Board on September 20, 1946 (R. 18). On October 8, 1946, the same day that the Guild filed its petition with the State Board, the Guild requested the National Labor Relations Board to

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[2] *Rand McNally Standard Map of Wisconsin; Peyroux v Howard et al.*, 7 Pet. 324.

approve a withdrawal of its petition to that Board (R. 19, 51).

On February 7, 1947, International Brotherhood of Electrical Workers, Local B-953 A. F. of L. filed with the Circuit Court of La Crosse County a petition for review of the certification of bargaining representatives by the Wisconsin Employment Relations Board in this case under Sections 111.05(3) and 111.07(8) of the Wisconsin Statutes. This petition contended that the decisions, orders and certifications of the Wisconsin Employment Relations Board were contrary to the constitutional rights and privileges of the petitioner in that Chapter 111 of the Wisconsin Statutes had been so construed and applied as to bring it into conflict with the National Labor Relations Act and Article I, Section 8, and Article VI of the Constitution of the United States; that the Wisconsin Employment Relations Board had no jurisdiction over the subject matter for the reason that the National Labor Relations Board had previously undertaken to exercise the jurisdiction which the National Labor Relations Act conferred upon it and has not, insofar as the record discloses, relinquished such jurisdiction; that the decision and order of the Wisconsin Employment Relations Board affected the status of the employees of the La Crosse Telephone Corporation and caused a forfeiture of collective bargaining rights guaranteed to the petitioner under the National Labor Relations Act and that the certification made by the Wisconsin Employment Relations Board was in excess of its statutory authority and jurisdicton because the La Crosse Telephone Corporation is engaged in interstate commerce and the question of the representation of its employees is, therefore, a matter within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act (R. 6-10).

Judge Cowie of the Circuit Court of La Crosse County after considering the arguments in the case came to the conclusion that the decision of the Supreme Court of the United States in *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board* and *Allegheny Ludlum*

Steel Corporation v. *William J. Kelley et al.*, 330 U.S. 767, leaves no constitutional authority in the Wisconsin Employment Relations Board to determine collective bargaining units and to conduct collective bargaining elections among employees or employers engaged in interstate commerce and referred to the admission that the La Crosse Telephone Corporation is so engaged in interstate commerce (R. 1-2).

This decision was rendered on April 28, 1947, and judgment was thereafter entered reversing and setting aside the certification of a bargaining representative made on January 14, 1947, by the Wisconsin Employment Relations Board for employees of the La Crosse Telephone Corporation (R. 11-12).

The Wisconsin Employment Relations Board appealed through the Attorney General of the State of Wisconsin, to the Supreme Court of Wisconsin from the judgment of the Circuit Court of La Crosse County (R. 45-46).

The Supreme Court of Wisconsin in a decision rendered December 23, 1947, reversed the judgment of the Circuit Court and remanded the cause with directions to enter judgments in accordance with its opinion which sustained the State Board's direction of election and its certification of the Guild (R. 48-59). The Supreme Court of Wisconsin ruled that the National Labor Relations Board has paramount power over the subject of bargaining representatives, but that such power is not exclusive in the instant case until the federal power is exercised or jurisdiction is taken as to particular employees. The Supreme Court of Wisconsin was also of the view that the decision of the Supreme Court of the United States in *Bethlehem Steel Company* v. *New York State Labor Relations Board, supra,* did not require a ruling in this case that the state Board is without jurisdiction (R. 55).

The present appeal was then taken. On April 19, 1948 an order was entered postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 71).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Wisconsin erred:

I. In rejecting the contention of appellant that the question or controversy over which the Wisconsin Employment Relations Board sought to assert jurisdiction under the Wisconsin Employment Peace Act in the proceeding before said Board in which was issued the certification of a bargaining representative is a question or controversy exclusively within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act, and is not within the jurisdiction of the Wisconsin Relations Board under the Wisconsin Employment Peace Act.

II. In failing and refusing to hold that the Wisconsin Employment Peace Act cannot have any lawful application to the aforesaid question or controversy under the provisions of Section 8 of Article I and Clause 2 of Article 6 of the Constitution of the United States.

III. In failing and refusing to follow the applicable decision of the Supreme Court of the United States in the case of the *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board* and *Allegheny Ludlum Steel Corporation* v. *William J. Kelley, et al., supra.*

SUMMARY OF ARGUMENT

I

The Supreme Court of the United States has jurisdiction of this appeal under section 237(a) of the Judicial Code. The Supreme Court of Wisconsin has rendered a final judgment upholding the application of the Wisconsin Employment Peace Act by the Wisconsin Labor Relations Board to a question of representation affecting commerce which is under the exclusive jurisdiction of the National

Labor Relations Board. The Wisconsin Court has thereby rendered a decision which draws in question the validity of a state statute on the grounds of repugnance to the Constitution or laws of the United States.

The assumption of jurisdiction by this Court in the case of *Allegheny Ludlum Steel Corporation* v. *Kelley et al.*, 330 U.S. 767 demonstrates that the instant case is a proper subject for the assumption of jurisdiction. Here, as in the *Allegheny Ludlum Steel Corporation* case, the constitutionality of the application of the state act has been challenged by a method adequate under the state law to raise the question and the judgment of the lower court is final. The court judgment from which this appeal has been taken has fully determined legal rights of the parties. The certification of a bargaining representative, although it does not command action, for all practical purposes determines legal rights as effectively as the judgment of a court.

II

The National Labor Relations Board under the Wagner Act had exclusive jurisdiction of questions of representation affecting commerce. This court in the case of *Bethlehem Steel Company et al.* v. *New York State Labor Relations Board*, 330 U.S. 767 has in general rejected the doctrine of concurrent jurisdiction to decide the appropriate unit or representation. In particular this court has rejected the contention that a state board may act until the federal board has acted in the same case. The adoption of section 10(a) of the Labor-Management Relations Act of 1947 shows what the Congress considers to be a reasonable solution to the problem of adjusting state and federal authority in the labor relations field. Congress has recognized the exclusive jurisdiction of the National Board and has provided for cession of such jurisdiction by the board under certain conditions and if the procedure of agreement between the state and national administrative agencies is followed. Recent decisions of all lower courts,

with the exception of the Supreme Court of Wisconsin, have denied concurrent jurisdiction in the state boards in cases of representation affecting commerce.

III

A. The La Crosse Telephone Corporation is an instrumentality of interstate commerce and is, therefore, subject to the jurisdiction of the National Board. The corporation operates in a city of 42,000, located on the boundary line of Wisconsin and Minnesota, and services 15,000 subscribers in a county adjacent to the state line. The Circuit Court of La Crosse County, Wisconsin made its decision denying jurisdiction in the State Board on the basis of the admission that the La Crosse Telephone Corporation is engaged in interstate commerce. This finding was not disturbed by the Supreme Court of Wisconsin which assumed in its opinion that questions of representation of employees of this company would be within the jurisdiction of the National Labor Relations Board. It is clear from the record that the corporation is handling interstate telephone calls as part of its service. The National Board has asserted jurisdiction in other cases involving telephone companies of the same status and character of La Crosse Telephone Corporation. These decisions have been uniformly upheld by U. S. Circuit Courts of Appeals which have ruled that telephone companies are engaged in interstate commerce within the meaning of the Act regardless of the fact that the long distance calls handled by such companies constituted only a small percentage of the total messages handled.

B. The jurisdiction of the National Labor Relations Board over questions of representation of employees of La Crosse Telephone Corporation is exclusive. Even if the policies of the Wisconsin and Federal Labor Relations Acts were parallel on questions of representation, the State Board would not have concurrent jurisdiction in this case. The Supreme Court of the United States has rejected the view that the National Board's power is not exclusive until

the federal power is exercised, which is the basis of the decision by the Supreme Court of Wisconsin. The fact, however, is that the policies of the Wagner and Wisconsin Employment Peace Acts on questions of representation are inconsistent. Thus, the certification in the instant case excluded supervisory employees under the provisions of the Wisconsin Act defining an "employee" as including "any person, other than an individual contractor, working for another for hire in the State of Wisconsin in a non-executive or non-supervisory capacity." It is apparent that even if the effort to limit the doctrine of the *Bethlehem Steel Company* case were accepted, the National Board's jurisdiction in this case is exclusive of state power because the policy of the Wisconsin Act under which administrative action was taken, conflicted with the policy of the National Act.

ARGUMENT

I. THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW UPON THIS APPEAL THE FINAL JUDGMENT OF THE SUPREME COURT OF WISCONSIN.

The jurisdiction of this Court has been invoked by this appeal under section 237(a) of the Judicial Code. It is our view that in this case there is drawn in question the validity of a statute of the state of Wisconsin on the ground of its being repugnant to the Constitution or laws of the United States and that the final judgment here sought to be reviewed of the Supreme Court of Wisconsin, that being the highest court in the State of Wisconsin in which a decision in this case could be had, is in favor of the validity of the state statute involved.

The propriety of this Court's assumption of jurisdiction in this case is demonstrated by the procedural aspects of the *Allegheny Ludlum Steel Corp. Case, supra.* There, a petition for certification was filed with the New York State Labor Relations Board by the Foremen's Association on December 30, 1943 (*Allegheny Ludlum Steel Corporation* v. *Kelley et al.*, Transcript of Record in the Supreme

Court of the United States, Oct. Term 1946 no. 76, Filed April 3, 1946, p. 59) and on April 14, 1944 the Company filed an action with the Supreme Court of New York, County of Chautauqua, seeking a declaratory judgment that the State Board did not have jurisdiction to hold the election because the National Board had exclusive jurisdiction (Ibid p. 41) and praying for an injunction to restrain the State Board from proceeding to determine a bargaining representative for the foremen (Ibid p. 59). The State Board, thereafter, on May 24, 1944 issued its Decision and Direction of Election (Ibid p. 41). The election was held on or about June 21, 1944 and the Board found that the majority of eligible foremen who voted in the election chose the Foremen's Association to be their representative (Ibid p. 47). On July 28, 1944, the New York Supreme Court in Chautauqua County dismissed the Company's complaint on the merits (Ibid p. 59). Thereafter, the Company appealed unsuccessfully through the various state courts which affirmed the judgment of the lower court. The Company appealed to the Supreme Court of the United States after judgment had been entered by the Supreme Court of Chautauqua County on the judgment and remittitur of the highest appellate court in New York, the Court of Appeals of New York (Ibid p. 71). The Supreme Court of the United States noted probable jurisdiction on April 22, 1946 (Ibid p. 79) and accepted the appeal and decided the case in its opinion rendered April 7, 1947 (330 U.S. 767).

The differences between the facts raising the jurisdictional question in the *Allegheny Ludlum Steel Corp.* case and the instant case are not material. There, the constitutional issue was raised by an action for declaratory judgment and injunction. Here, the constitutional issue has been raised by a petition for review of the order of certification which was brought under Sections 111.05(3) and 111.07(8) of the Wisconsin Statutes (R. 2). In both cases, the constitutionality of the application of the State

Acts was challenged by methods adequate under the respective State laws to raise the question.

In the *Allegheny Ludlum Steel Corp.* case the appeal was taken from the judgment entered by the New York Supreme Court in Chautauqua pursuant to the judgment and order of remittitur of the Court of Appeals of New York. Here, the appeal was taken from the judgment entered by the Supreme Court of Wisconsin reversing the judgment of the Circuit Court of La Crosse County and remanding the cause with directions to enter judgment accordingly (R. 57). In both cases the judgments appealed from were final. This Court has ruled that a judgment is considered as final in the court below and appealable to this court where the judgment of the appellate court has fully determined the rights of the parties, so that there is nothing remaining to be done by the trial court except the ministerial act of entering the judgment which the appellate court directed. *Department of Banking* v. *Pink*, 317 U.S. 264, 267.

It is entirely clear that the judgment of the Supreme Court of Wisconsin affirming the validity of the certification, in addition to being final, adjudicated the legal rights of the parties. A certification of a bargaining representative by a government agency establishes legal rights and relationships. This Court has been careful to point out that the denial of direct judicial review of certifications of the National Board is based on the language of the National Act and its legislative history on the limitation of subjects for such review. *American Federation of Labor* v. *N.L.R.B.*, 308 U.S. 401. The legal character of a certification was described as follows: "In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification itself does not command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be re-examined by courts under particular statutes providing for the review of 'orders'." (*American Federation of Labor* v. *N.L.R.B.*, *supra*, p. 408;

See *Columbia Broadcasting System* v. *U.S.*, 316 U.S. 407, 418, 425).

It is also our view that the questions involved in this appeal are substantial. The reasons supporting our view on this point are set out in this Brief pp. 19-26, *infra*, and our Statement as to Jurisdiction.

II. THE NATIONAL LABOR RELATIONS BOARD HAS EXCLUSIVE JURISDICTION OVER QUESTIONS OF REPRESENTATION AFFECTING COMMERCE.

Many complex questions raised by the relationship of state and federal administrative agencies in the field of selection of representatives of employees for collective bargaining purposes have been resolved by this Court in the cases of *Bethlehem Steel Co., et al.*, v. *N. Y. State Labor Relations Board* and *Allegheny Ludlum Steel Corp.* v *Kelley et al.*, 330 U.S. 767.

The facts in these cases were as follows: In 1944, the State Labor Relations Board of the State of New York entertained petitions of foremen for election and certification of representatives for bargaining units of foremen employed by the Bethlehem and Allegheny Ludlum Steel Companies. The petitions were filed at a time when the National Board refused to recognize bargaining units of foremen as "appropriate" under the National Act. Prior to the decision of this Court the National Board changed its position and was following a policy similar to that of the State Board in recognizing such units. The companies operated manufacturing plants in New York which were subject to the jurisdiction of the National Board under the rule of *N.L.R.B.* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1.

The State and National Boards had entered into an agreement July 12, 1937 establishing a system of "clearing" doubtful cases and providing that in certain named industries the State Board would assume jurisdiction without clearance. The document of agreement stated that:

"The position was repeatedly expressed by the representatives of both National and State Boards that as a working matter the jurisdiction of the two Boards must be allotted on the basis of the type of industry or business involved (*rather, for example, than on the basis of which Board a petition or charge is initially filed with*), and that when one Board, *pursuant to common understanding,* has asserted jurisdiction in the past over a particular employer, the other Board should thereafter refer any matter coming to it to the Board which had entertained the earlier case or cases." *Bethlehem Steel Co. et al.* v. *N. Y. State Labor Relations Board, supra,* pp. 788, 789.

It was further stated in this document that "even a tentative understanding" of concurrent jurisdiction must await mutual study of a memorandum then in process of preparation.

On April 20, 1945 a conference of officials of the State and National Boards was held to discuss the problem of respective jurisdiction of the Boards and, in particular, the matter of petitions for foremen's units since the decision of the National Board allowing the organization of such units in the *Packard* case, 61 N.L.R.B. 4 (1945). After discussion of the appropriate lines of demarcation of jurisdiction over certain named industries, the conference turned to the question of concurrent jurisdiction.

It appeared that the memorandum which was to have been the subject of mutual study after the 1937 agreement, was never prepared and no subsequent understanding had been reached as to concurrent jurisdiction. The Federal representatives pointed to the recent decision in the *Packard* case and suggested leaving all cases involving large manufacturing establishments doing interstate business to the National Board. "The impracticability of both Boards intermittently asserting jurisdiction over the same employers was emphasized . . ." (*Bethlehem Steel Co., supra;* p. 793).

After further discussion of the important obligations of the New York Board in the matter of the maintenance

of industrial peace within the boundaries of New York, the representatives of the New York Board agreed "that their officials should not reach out for cases of this character, involving large interstate manufacturers." (Ibid. p. 794). No broad understanding was reached in this matter, however, and the issue was left open "both Boards reserving their respective positions with regard to petitions for unions of supervisory employees and *other petitions* involving large interstate manufacturers." (Ibid. p. 794).

This Court concluded that it was beyond the power of New York State to apply its policy to the companies in these cases.

The Court referred to the unsettled state of the law on foremen's units at the time the Courts of the State of New York were considering the matter which was not resolved until the decision of *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485 and stated that "Whatever constitutional issue may have been presented by earlier phases of the evolution of Federal policy in relation to that of the State, the question now is whether, Congress having undertaken to deal with the relationship between these companies and their foremen, the State is prevented from doing so" *Bethlehem Steel Co. et al.* v. *N. Y. State Labor Relations Board*, 330 U.S. 767, 771.

The Court went on to state that "Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation and it involves the same employers and the same employees. . . . If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make the action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the Federal Board had acted in the same case. But we do not think that a case by case test of federal

supremacy is permissible here. The Federal Board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the *Packard* case, *supra*, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted." (Ibid pp. 775-776).

The rule of the *Bethlehem Steel Co.* case is clear. The National Labor Relations Board had exclusive jurisdiction under the Wagner Act over all questions of representation affecting commerce. The State Boards did not have concurrent jurisdiction over such questions. We do not discuss the effect under the Wagner Act of an agreement by the National Board to cede jurisdiction to a State Board in a case of representation affecting commerce, or of a declination of jurisdiction by the National Board for budgetary or other reasons. These points were not raised by the facts in the *Bethlehem Steel Co.* case nor are they raised by the facts in the instant case.

The Congress has given recent evidence in the Labor Management Relations Act of 1947 * of what it considers a reasonable solution to the problem of adjusting State and Federal authority in the labor relations field. In appraising the Congressional intent expressed in the Wagner Act, this evidence may be considered to have a value equal to inference of intent which is drawn not so much from the language of the statute but from the assumption that Congress intended a reasonable answer to the Federal-State problem in labor relations administration. The Congress, when legislating specifically on the subject, has not vested a general concurrent jurisdiction in the States; nor has it provided that the administrative agency which is first on the scene shall have jurisdiction of the case. On

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* Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session (29 U.S.C., Supp. 151 et seq.).

the contrary, it has recognized the exclusive jurisdiction of the National Board and has provided that such jurisdiction of the board can be *ceded* but only in certain types of cases and if there is followed the procedure of *agreement* between the State and National administrative agencies. It should be presumed, in our view, that the Congress was aware, both when it adopted the Wagner Act and when it adopted the Labor-Management Relations Act of 1947 of the tendency of dual administrative agencies to engage in competition and the duplication of functions as well as the tendency of private parties to "shop around" for the most advantageous forum.

Section 10(a) of the new Act provides that "the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

The explanation of this provision in the Conference Report on the bill is as follows:

> "The Senate amendment, contained a proviso at the end of section 10(a) authorizing the Board to cede jurisdiction over any cases in any industry to State and Territorial agencies, subject to two conditions: (a) That it can cede jurisdiction in cases arising in mining, manufacturing, communications and transportation only when the employer's operations are predominantly local in character, and (b) that it may cede jurisdiction only if the applicable provisions of the State or Territorial statute and the rules of decision thereunder are consistent with the corresponding provisions of the National Act,

as interpreted and applied by the Board and by the courts. The House bill contained no provision corresponding with the proviso of section 10(a) of the Senate amendment. The conference agreement adopts this proviso." *Legislative History of the Labor Management Relations Act of* 1947, (published by the National Labor Relations Board) p. 536.

The House Report stated that:

"As under the present Act, the power of the Board under the amended act in the matter of unfair labor practices is exclusive.[4] This rule has necessitated a special provision (sec. 13, hereafter discussed) to give to the States a concurrent jurisdiction in respect to closed shop and other union security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause." (Ibid p. 331)

The procedure for ceding jurisdiction of the National Labor Relations Board which is established by section 10(a) has not been generally utilized because the States have not, as yet, enacted statutes paralleling the Labor-Management Relations Act of 1947. See *Report of the Joint Committee on Labor Management Relations Pursuant to Section 401 of the Labor-Management Relations Act*, Report No. 986, 80th Congress, 2nd Session, pp. 30-31. As a result of negotiations between the National Board and representatives of the State of Wisconsin an agreement has been reached, effective August 27, 1948, which is limited solely to the administration of the union security provisions of the State and National Acts. (22 L.R.R.M.

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[4] If literal effect is given to this sentence and the placing of the jurisdiction clause in section 10, the procedure for ceding jurisdiction to the States would appear limited to unfair labor practice cases. The legislative history of the Act, as a whole, does not bear out this interpretation and the procedure would appear available in representation cases.

268). There has not been, nor is there now, an agreement between the National Board and the State Board of Wisconsin allocating or ceding jurisdiction in representation proceedings.

There are a number of recent cases in the lower courts decided since *Bethlehem Steel Co.* which have discussed the matter of federal state relationships in the field of certification of bargaining representatives. All the courts, with the exception of the Wisconsin Supreme Court, have ruled that the federal power is exclusive in this field and that the state administrative agencies may not act in cases affecting commerce until the federal power is actually exercised in the particular case.

In *Pittsburgh Rys. Co. Substation Operators and Maintenance Employees* case, 357 Pa. 379, 54 A. (2d) 891, the Pennsylvania Labor Relations Board issued a certification of a bargaining representative, prior to enactment of the Labor-Management Relations Act of 1947, for a unit of employees of a company engaged in operations affecting commerce and in *Food, Tobacco Union* v. *Smiley*, 164 F. (2d) 891, (C.A.A. 3) this Board sought to institute certification proceedings in a similar situation. On the basis of the rule in *Bethlehem Steel Co.* the Pennsylvania Court and the U. S. Circuit Court of Appeals for the Third Circuit [5] held the National Board had exclusive jurisdiction over the subject matter and the State Board was, therefore, barred from asserting concurrent jurisdiction.

Certification proceedings instituted before State Boards by labor organizations which have not complied with sections 9(f), (g) and (h) of the Labor-Management Relations Act of 1947 have been restrained by Federal District Courts at the instance of a private party (*Linde Air Products Co.* v. *Johnson*, 77 F. Supp. 656) and of the

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[5] The Circuit Court in *Food, Tobacco Union* v. *Smiley* considered binding the definition of the authority of the State Board by the highest appellate court in Pennsylvania. *Erie Railroad Co.* v. *Tompkins* 304 U.S. 64.

National Board (*N.L.R.B.* v. *Industrial Commission of Utah*, 15 Labor Cases, Par. 64, 626).[6]

III. THE QUESTION OF REPRESENTATION OVER WHICH THE STATE BOARD IN THIS PROCEEDING SOUGHT TO ASSERT JURISDICTION AFFECTS COMMERCE AND IS, THEREFORE, WITHIN THE EXCLUSIVE JURISDICTION OF THE NATIONAL BOARD.

A. THE LA CROSSE TELEPHONE CORPORATION IS AN INSTRUMENTALITY OF INTERSTATE COMMERCE.

The status under the National Act of the telephone industry in general, and the La Crosse Telephone Corporation in particular, is determined not only by what the National Board has done but also by what it is permitted or required to do under law. The National Board is not an agency of self creating or self abnegating powers. It is a government bureau authorized or directed to carry out the expressed will of the Congress.

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[6] Faced with the identical problem, the Wisconsin Employment Relations Board first adopted the rule that "Once the National Board has assumed jurisdiction and declined to act, not because of its lack of jurisdiction, but because one of the parties before it is barred by the provisions of the statute, the power of the state to act has been superseded by the exercise of the conceded power of the Federal Government." (*Eau Claire Press Co.* Case II No. 1797 E-659, Decision No. 1456, November 3, 1947, 21 Labor Relations Reporter Manual 1085). Subsequently, the Wisconsin Board ruled that the fact that the particular case had not been presented to the National Board did not affect the conclusion that the State Board lacked jurisdiction. "Where the evidence is clear that the employer's labor relations fall within the jurisdiction of the national act, any action by the state in conflict with the policy of the national act is prevented under the rules laid down in the Bethlehem case. It is our conclusion that when Congress prevented, by legislation, the National Board from entertaining any proceedings instituted by non-complying unions it has determined the policy to be followed. The adoption by Congress of this policy, followed by the National Board, is an exercise of its jurisdiction in accordance with the mandate of Congress and effectively prevents the state from acting in a contrary manner." (*Crown Can Co.* Decision of Wisconsin Employment Relations Board Case I, No. 2195 E-769, Decision No. 1738-A, August 21, 1948; 22 Labor Relations Reporter Manual 1369, 1370).

The jurisdiction of the Board over representation cases is fixed by the phrase "question affecting commerce" (sec. 9(c)). "Affecting commerce" is defined by the Act as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Sec. 2(7)). The term "commerce" is defined by the Act to include "communication among the several states (Sec. 2(6))."

No labored exposition is required to show that a company such as the La Crosse Telephone Corporation operating in a city of more than 40,000, located on the river separating the States of Wisconsin and Minnesota and serving 15,000 subscribers in a county adjacent to the State line (*supra*, pp. 2-3) is engaged in interstate communication and is, therefore, an instrumentality of commerce. The Circuit Court of La Crosse County found, moreover, that "it is admitted that the La Crosse Telephone Corporation is so engaged in interstate commerce" (R. 1). This finding was not disturbed by the Supreme Court of Wisconsin which indeed recognized the paramount character of the National Board's power over the determination of the appropriate bargaining representative or unit of representation in the case involved in these appeals (R. 55).[7] The Supreme Court of Wisconsin specifically described the status of the La Crosse Telephone Corporation as follows: "The Employer is a Wisconsin Corporation and all its employees are employed in La Crosse County in this state in its operation of a local telephone service within the La Crosse area, and rendering in connection therewith such intrastate and interstate long distance service as is incidental thereto" (R. 49).

In the similar case of *National Labor Relations Board* v. *Central Missouri Telephone Company* 115 F.(2d) 563 (C.C.A. 8) the National Board asserted jurisdiction over a telephone company whose lines were wholly within the

[7] See *Hill* v. *Florida*, 323 U.S. 538, 543-544, Fn. 2.

State of Missouri. This company made wire connections for incoming and outgoing long distance calls with an interstate carrier (the Bell System) which handled such calls after the connections were made. The court upheld the assertion of jurisdiction on the ground that the telephone company was an instrumentality of commerce and thus engaged in interstate commerce within the meaning of the Act, regardless of the fact that the long distance calls constituted only a small percentage of the total messages handled.

The Corcoran Telephone Exchange of Corcoran, California, (population 2,092)[8] has been held an instrumentality of commerce although its lines were limited to the city of Corcoran *N.L.R.B.* v. *Boswell Co. and Corcoran Telephone Exchange,* 136 F. (2d) 585 (C.C.A. 9). Long Distance calls to or from points outside the city of Corcoran or California were effectuated through the facilities of the Exchange and the Pacific Telephone and Telegraph Company. During the year in question the Exchange handled over 35,000 toll calls through the facilities of the Pacific Telephone and Telegraph Company of which number there were 77 outgoing calls to points outside California and an undisclosed number of incoming calls from outside the State. The Court stated that "the facilities of the Exchange are an integral part of the vast network of telephone lines which cover the entire nation. While these lines are owned by a large number of small telephone companies, such as the Exchange, they are operated as a unified system by virtue of physical connection of the line and such operating agreements as are here involved. The Exchange's facilities and lines are admittedly available and used for the transmission of interstate messages, both those originating and terminating within the Exchange's system. The Exchange is thus an instrumentality of interstate commerce, and as such is clearly subject to Federal regulation, irrespective of any showing as to the amount of interstate traffic actually

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[8] *1940 Census.*

using its facilities. *Associated Press* v. *N.L.R.B.*, 301 U.S. 103, 128, *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* 96 U.S. 1."

The courts have frequently ruled that the coverage of the Act does not depend upon percentages. *Santa Cruz Fruit Packing Co.* v. *N.L.R.B.*, 303 U.S. 453, 467; *N.L.R.B.* v. *Fainblatt*, 306 U.S. 601; *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197; *J. L. Brandeis and Sons* v. *N.L.R.B.*, 142 F. (2d) 977 (C.C.A. 8), cert. den. 323 U.S. 751.

There are other cases showing that it has been the policy of the National Board to assume jurisdiction over the labor relations of telephone companies in the position of La Crosse Telephone Corporation.[9]

It is clear that labor strife affecting the continued operations of the La Crosse Telephone Corporation would substantially affect commerce. The Corporation and its labor relations are undoubtedly subject to the provisions of the National Labor Relations Act and the jurisdiction of the National Labor Relations Board.

B. THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD OVER QUESTIONS OF REPRESENTATION OF THE EMPLOYEES OF LA CROSSE TELEPHONE CORPORATION IS EXCLUSIVE.

Even if the policies of the Wisconsin and Federal labor relations acts were parallel on questions of representation the State Board would not thereby acquire concurrent jurisdiction. In the *Bethlehem Steel Co.* case, this Court clearly rejected the argument of the State of New York "for a rule that would enable it to act until the federal board had acted in the same case" (330 U.S. 767, 776). It is this very rule which was the basis of the decision of the Supreme Court

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[9] *The Elyria Telephone Company of Elyria, Ohio* 58 N.L.R.B. 402; *Newark Telephone Company of Newark, Ohio* 59 N.L.R.B. 1408; *Ohio Telephone Service Company* 72 N.L.R.B. 488.

of Wisconsin holding that the State Board had jurisdiction in the *La Crosse case*.[10]

The exercise of governmental power in the matter of selection of representatives for collective bargaining purposes does not constitute action merely in a ministerial capacity. This Court has recognized that the administrative authority in such cases has been delegated a wide discretion in applying the plan of regulation to specific instances. (*Bethelehem Steel Co., supra*, p. 775).

Indeed, this Court cited in support of its conclusion an illustration of conflicting determinations by the State and National Boards involved in the instant case. *Matter of Creamery Package Manufacturing Company* 34 N.L.R.B. 108; Wisconsin Employment Relations Board Decision Case No. 348 E 117.

The Wisconsin Board in the *Creamery Package Co.* case established a collective bargaining unit including confidential employees in its decision of June 23, 1941 and the National Board established a collective bargaining unit for employees of the same company excluding confidential employees in its decision of August 9, 1941.

Proof of the actuality of conflict between government agencies in the administrative application of parallel State and National policies in representation proceedings is not given for the purpose of conceding that such inquiry must be made by this Court. On the contrary, it is submitted that the Congress did not intend by enactment of the Wagner Act to leave concurrent jurisdiction in the State Boards, the constitutional status of which would depend in each case on a ruling by the United States Supreme Court as to whether the application of policy by the State Board to

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[10] "But, although the National Board's power over that subject is paramount it is not exclusive in such a case as we have here, until the federal power is exercised or jurisdiction thereto is taken as to particular employees." (*La Crosse Telephone Corporation* and *IBEW Local B-953* v. *Wisconsin Employment Relations Board et al.* (R. 55))

the facts of the individual case could be reconciled with the application of policy by the National Board to the facts in similar cases.

Nor can the answer to the question of whether Congress intended to leave concurrent jurisdiction in the States and their administrative agencies depend on the accident of whether the State Board gets the case first or whether the National Board has previously had the occasion to administer a representation proceeding for the employees of the particular company. The lack of reasonable basis for such a rule of jurisdiction is implicit in the accidental character of the test. The administrative agencies (New York and National Labor Relations Boards) having the widest measure of practical administrative experience with the problem of allocating jurisdiction agreed that jurisdiction must be allotted on the basis of the type of industry or business involved rather than on the basis of which Board a petition or charge is initially filed with. (*Supra*, p. 13).

Certainly, the Congress should not be assumed to have intended an unreasonable result unless this is expressly required by the specific language of the National Labor Relations Act. This, of course, is not the case, for that Act does not even provide for the yielding of jurisdiction to the States by agreement of the National Board.[11]

The question of whether the National Board could have yielded jurisdiction over the employees of the La Crosse Telephone Corporation is not presented by this case since the National and State Boards did not have an agreement nor is there evidence in the record even of informal clearance.

The present Act would require a formal agreement between the State and National Boards executed under section 10(a) as a condition precedent to the assumption of jurisdiction by the State Board. Such agreement could

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[11] See *Bethlehem Steel Co. supra*, Appendix to Separate Opinion, Fn. 1 at page 789.

not be made nor could the National Board yield or abdicate its power in a case where the facts raise a question of representation affecting commerce, unless the requirement of the proviso that the applicable state law be consistent with the corresponding provision of the National Act could be satisfied. In the case of Wisconsin and all the other states it has not been possible thus far for the National and State Boards to execute such an agreement covering representation proceedings because of the inconsistency of the provisions of State and Federal labor relations laws. (See 22 L.R.R.M. 268).[12]

The fact is, however, that the policies of the Wagner Act and the Wisconsin Employment Peace Act in representation cases were also inconsistent. Thus, in the instant case the petition for an election and the certification issued by the State Board excluded supervisory employees. The petition was drafted in accordance with section 111.02(3) of the Wisconsin Act which defined "employees" as including "any person, other than an independent contractor, working for another for hire in the State of Wisconsin in a non-executive or non-supervisory capacity." (Appendix to Brief p. 27). At this time, October 8, 1946 (R. 19) the National Labor Relations Act set forth a contrary

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[12] The lack of agreement ceding jurisdiction under section 10(a) of the Labor Management Relations Act of 1947 has not prevented the Wisconsin Employment Relations Board from assuming jurisdiction in representation proceedings involving employees of a boat manufacturing company admittedly engaged in interstate commerce. *Shell Lake Boat Co.* Decision of Wisconsin Employment Relations Board Case No. 1794 E-658 R-792, Decision No. 1437, September 29, 1947. This action was affirmed by decision of the Wisconsin Circuit Court for Washburn County relying upon the decision of the Supreme Court of Wisconsin in *La Crosse Telephone Corporation* and the practical effect of an adverse ruling on the State Boards. 22 Labor Relations Reporter Manual 2360, 2362-3. More recently the Wisconsin Board has announced the rule that it will refuse to direct elections in cases where the National Board has at some previous time assumed jurisdiction and determined the collective bargaining unit and certified a bargaining representative. *Kearney and Tucker Corp.* Case No. 1094 E-725, Decision No. 1636, May 21, 1948.

policy of authorizing representation proceedings for supervisory employees (*Packard Motor Car Co.* v. *N.L.R.B.* 330 U.S. 485) and it was the policy of the National Board to establish bargaining units for foremen (*Packard Motor Car Co. v. N.L.R.B.*, 61 N.L.R.B. 4, 1212 (1945); *Jones and Laughlin Steel Corp.*, 66 N.L.R.B. 386) and at no time did the National Board hold that supervisors were not employees, *Soss Manufacturing Co.*, 56 N.L.R.B. 348.

In this respect, therefore, the policies of the Acts and the Boards differed on exactly the same issue involved in the *Bethlehem Steel Co.* case.

Other differences in the provisions of the Acts relating to representation proceedings will be found in the authorization of the Wisconsin Act for the establishment of craft units by a majority vote of employees engaged in a single craft (Sec. 111.02(6) Appendix to Brief pp. 27-8) and the definition of strikers retaining the status of "employees" (Sec. 111.02(3) Appendix to Brief p. 27).

We are, therefore, of the view that even if the effort to limit the doctrine of the *Bethlehem Steel Co.* case were accepted, the National Board's jurisdiction in this case was exclusive of state power.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted.

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October, 1948.

APPENDIX A

The pertinent provisions of the Wisconsin Employment Peace Act (Wisconsin Laws of 1939, Chapter 57, as amended by Wisconsin Laws of 1943, Chapter 375, Wisconsin Laws of 1945, Chapter 424 and Wisconsin Laws of 1947, Chapter 2; Chapter 111, Sub Chapter I of the Wisconsin Statutes, Sections 111.01 to 111.09) are as follows:

Sec. 111.02(3). The term "employee" shall include any person, other than an independent contractor, working for another for hire in the State of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (a) who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employee or his representative, (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, (c) who has not obtained regular and substantially equivalent employment elsewhere, or (d) who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employee who is subject to the federal railway labor act,

Sec. 111.02(6). The term "collective bargaining unit" shall mean all of the employees of one employer (employed within the state), except that where a majority of such em-

ployees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in Section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered, provided, that in appropriate cases, and to aid in the more efficient administration of the employment peace act, the Board may find where agreeable to all parties affected in any way thereby an industry, trade or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the Board shall be subject to all rights by termination or modification given by this Chapter 111 in reference to collective bargaining units otherwise established under said chapter. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit shall have voted by secret ballot as provided in Section 111.05 (2) so to do.

Sec. 111.05 Representatives and Elections.—(1) Representatives chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representatives of all of the employees in such unit for the purpose of collective bargaining, provided that any individual employee or any minority group of employees in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in Section 111.02(6), it shall be determined by secret ballot, and the Board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employees in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employees in a collective bargaining unit the

Board shall determine the representatives thereof by taking a secret ballot of employees and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employee or group of employees participating in the election, except that the Board may, in its discretion, exclude from the ballot one who, at the time of the election stands deprived of his rights under this chapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The Board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of Section 111.07 for review of orders of the Board.

(3m) Whenever an election has been conducted pursuant to subsection (3) in which the name of more than one proposed representative appears on the ballot and results in no conclusion, the Board may, in its discretion, if requested by any party to the proceeding within 30 days from the date of the certification of the results of such election, conduct a run-off election. In such run-off election, the Board may drop from the ballot the name of the representative that received the least number of votes at the original election, or the privilege of voting against any representative when the least number of votes cast at the first election was against representation by any named representative.

(4) Questions concerning the determination of collective bargaining units or representation of employees may be raised by petition of any employee or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring prompt action, the Board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of

another election among the same group of employees, provided that it appears to the Board that sufficient reason therefor exists.

Sec. 111.07(8). The order of the Board shall also be subject to review in the manner provided in Chapter 227, except that the place of review shall be the circuit court of the county in which the appellant or any party resides or transacts business.

(10) Commencement of proceedings under subsection (7) shall, unless otherwise specifically ordered by the court, operate as a stay of the Board's order.

(11) Petitions filed under this section shall have preference over any civil cause of a different nature pending in the circuit court, shall be heard expeditiously, and the circuit courts shall always be deemed open for the trial thereof.

APPENDIX B

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U.S.C. 151 et seq.) and of the Labor Management Relations Act, 1947 (Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session, 29 U.S.C., Supp., 151 et seq.) are as follows:

(1) The pertinent provisions of the National Labor Relations Act includes Secs. 2(3), 2(6), 2(7), 4(a), 9, and 10(a). These sections are set forth below:

Sec. 2. When used in this Act—

* * * * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

"Sec. 4(a). Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

"9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bar-

gaining, and otherwise to effectuate the policies of Sections 151-166 of this title, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 160 of this title or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

"(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 160(e) or 160(f) of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(2) The pertinent provisions of the Labor Management Relations Act, 1947 include Secs. 2(3), 2(6), 2(7), 4(a), 9, and 10(a).

"Sec. 2(3). The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"Sec. 4.(a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not

employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

"SEC. 9.(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate

for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to

him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts cer-

tified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)

(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transaction, (k) participation in insurance or other

benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the

Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.